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ABSTRACT

The historical, political, and legal evolution of Canada and its traditions has differed from that of the United States' uncritical adoption of U.S. case law. Canada's 1982 Charter, the counterpart of the United States Bill of Rights, is discussed. This paper examines the fundamental differences between Canadian and U.S. value patterns and legal norms; the argument is then tested by applying discussion conclusions to two areas of school law--due process and student rights. Whereas the United States was conceived in a revolution against an authoritarian and paternalistic government, Canada was formed out of a compromise among four colonies, based on common interest in building a railway and willingness to remain under imperial rule for another 100 years. Canadian political culture espouses traditional values and an "elite accommodation" governance style in which policymaking and political leadership are delegated to elites representing major subcultural groups. The greater respect for authority and lesser concern for equality (compared to the United States egalitarian ethos) means that Canadians have not used the courts to the same extent. Because basic civil rights have not been entrenched in a constitution, this legal tradition is weaker than in the United States. The elite accommodation philosophy, which emphasizes deference to school authorities and the need for order, carries over to schools. Canadian courts have granted broad powers to school authorities, both to make and enforce rules based on "in loco parentis" and "parens patriae." As a result, the Canadian school administrator has traditionally counted on a predictable socio-legal environment posing few challenges on substantive educational grounds. Specific due process and student rights applications are discussed, comparing Canadian and U.S. approaches. Implications for administrative practice are also discussed. Included are 58 legal references. (MLH)

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THE CHARTER, EDUCATIONAL ADMINISTRATION, AND U.S. CASE LAW: CONTRASTING LEGAL NORMS AND TRADITIONS

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The Charter, Educational Administration and U.S. Case Law: Contrasting Legal Norms and Traditions

Pat Pitsula and Michael E. Manley-Casimir

> I was walking down an antiseptically tidy street in downtown Ottawa when I became aware of a knot of some 20 pedestrians waiting on the curb. The light was red, but there were no cars in sight. No policemen, either. It was a narrow little street. The rain was fairly heavy and unpleasant. But still the small crowd waited patiently — rather stupidly I thought — until the light had changed ...
>
> After almost a year of living north of the border, I have come to realize that ... this is just the way things are in Canada.
>
> —M. Kaufman, "Canada - An American Discovers its Difference", The New York Times Magazine, May 15, 1983, p. 61

"The way things are in Canada" captures and foreshadows some of the quintessential features of Canadian life and times. Kaufman's observation, while descriptively accurate, metaphorically illuminates the tendency of Canadians to defer to established authority, to prefer order to freedom, dependence to initiative. In another sense, however, the episode is hyperbole capturing only what the writer wishes to convey, for in practice Canadians do not all wait for the light to change. Nevertheless, the values and norms that Kaufman illuminates reflect important features of Canadian tradition and social institutions, including schools.

So it is not surprising that 'the way things are in Canada' has implications for the practice and administration of education. Certainly school administrators are undoubtedly more effective and tactful if they possess knowledge of the socio-legal context in which they work. If, for example, a group of parents takes issue with the selection of Jane Rule's Desert Hearts for the school library, knowledge of parents' legal rights to ban the book and existing precedents would guide an administrator along a particularly thorny path. Knowledge of the socio-legal context extends, however, beyond a familiarity with the provisions of relevant statutory law to an understanding of the legal principles underlying court decisions. Public education, after all, receives its "operational pattern," in large measure, from these fundamental legal principles.[1]

The argument presented in this paper is that Canada's socio-legal context is different from that of the United States, and that "... the character of that difference makes educational administration distinctive."[2] This is not to deny that it is both inviting and instructive to look at U.S. case law in terms of the constitutional adjudication of educational issues. Lyon and Claydon, for example, observe that:

> American case law, because of its richness and because of the legal and cultural similarity between Canada and the U.S. is a primary source for Charter interpretation.[3]

We need to examine carefully, however, the assumptions that such legal and cultural similarities in fact exist, the extent of

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such similarities and, subsequently, whether judicial decisions handed down in the U.S. have any necessary application or utility either in influencing or deciding issues in Canadian jurisprudence. This paper examines these fundamental differences between Canada and the United States in terms of contrasting value patterns and legal norms and traditions in the two countries. We then test the argument by applying the conclusions of this discussion to two areas of school law — due process and student rights. Finally, we examine the implications of the argument for administrative practice both in terms of established tradition, and the radical changes required by the Charter of Rights and Freedoms.

1. CONTRASTS IN VALUE PATTERNS

(a) Elitism and Egalitarianism

Where Canada's founding document, the British North America Act of 1867, speaks of the right to "peace, order and good government," the U.S. Declaration of Independence of 1776 affirms "life, liberty and the pursuit of happiness" as inalienable rights. These phrases reflect the ideological climate within which each country was born, and provide an appropriate starting point for a look at contrasting value patterns. The U.S. was conceived in a spirit of revolution against a government perceived to be authoritarian and paternalistic in such matters as the imposition of tax laws without local representation. Canada, on the other hand, was formed as a result of a compromise reached between four colonies — a compromise framed through common interest in building a railway and willingness to remain under imperial rule for another hundred years. In fact, ultimate constitutional authority remained in Westminster until the enactment of the Constitution Act, 1982; former B.C. Supreme Court Justice Tom Berger sardonically points out:

> We have had a national flag only since the 1960's. We cannot agree on the words of our national anthem. We have no national waxworks.[4]

Seymour Martin Lipset in Revolution and Counterrevolution: Change and Persistence in Social Structures, develops this argument that the contrasting historical experiences of the U.S. and Canada help to account for the substantial differences in value patterns. Of the effect of the U.S. Revolution, Lipset observes:

> The success of the revolutionary ideology, the defeat of the Tories and the emigration of many of them north to Canada or across the ocean to Britain — all served to enhance the strength of the forces favoring egalitarian democratic principles in the new nation and to weaken conservative tendencies. On the other hand, the failure of Canada to have a revolution of its own, the immigration of conservative elements — all contributed to a more conservative and rigidly stratified society.[5]

Indeed, the evolution of the Canadian political culture has insured the persistence of traditional values which, arguably, has created a style of governance termed "elite accommodation."[6] The author of this term, Robert Presthus, states that elite accommodation means that "... policy making and political leadership are delegated to elites representing the major subcultural groups in society. They reconcile divisive issues and determine major policies in context,

isolated from their various constituencies."[7] During Canada's formative years, for example, a small core of executive officers and judicial advisors around the governor largely held the reins of power. Known in Upper Canada as the Family Compact and in Lower Canada as the Chateau Clique, these relatively small, tightly knit groups of men were in control of the day-to-day operation of the machinery of government. The fact that half of the leading members of the Family Compact and Chateau Clique were second generation Loyalist families lends credence to Lipset's and Presthus' analysis of Canada's traditional style of governance.

One of the noteworthy effects of "elite accommodation" is that such a style of governance requires deferential constituencies who will permit the exercise of considerable autonomy by their leaders.[8] The net result of this deference is a greater acceptance of traditional forms of governance — or as Henry David Thoreau once observed, "In Canada, you are reminded of the government every day." Most Canadians today, for example, are not troubled by the fact that arbitrary power is often exercised through Orders-in-Council — the legislative vehicles of the cabinet, acting as the governor-in-council, enacting subordinate legislation under the authority delegated to it by acts of the Canadian Parliament. The subject matter of this delegated legislation may range from questions of purely departmental routine to those of first-rate importance with far-reaching consequences, from the approval of a contract or the amendment of a minor regulation to the establishment of a nation-wide system of price control in time of war. Despite the potentially arbitrary nature of Orders-in-Council, most Canadians are seemingly not unduly disturbed because of the assumption that government formulates and implements protective and nurturing policies that are in the public interest.

The willingness of Canadians to permit the exercise of considerable power by leaders was seen in an extreme form in the use of the 1970 War Measures Act. After two high-ranking officials were kidnapped in Quebec and mailboxes blown up, martial law was invoked, habeas corpus suspended, and hundreds of people detained without charges. In fact, the War Measures Act gave the federal cabinet authority to pass whatever regulations it deemed necessary for the "security, defence, peace, order and welfare of Canada" including such measures as censorship, arrest, detention and deportation.[9] The reaction of most Canadians, including newspaper columnists and editorial writers throughout the nation, was in accord with that of Prime Minister Trudeau who had this to say about those who questioned the use of such excessive government authority:

> I think [that] society must take every means at its disposal to defend itself against the emergence of a parallel power which defies the elected power in this country, and I think that goes to any distance.
>
> So long as there is a power ... which is challenging the elected representatives of the people, I think that power must be stopped and I think it's only ... weak-kneed bleeding hearts who are afraid to take these measures.[10]

Conversely, the nature of the revolutionary experience in the United States encouraged a strong egalitarian ethos that contrasted strongly with the traditional elitism found in Canada. An anti-tyrannical bias in the form of the separation of powers was written into the Constitution to insure that no executive would ever

again be too powerful.[11] Concern for equality is a persistent theme in U.S. history: as early as the 1830's, de Tocqueville identified equality as the distinguishing feature of democracy in the U.S.A.:

> The more I advanced in the study of American society, the more I perceived that ... equality of condition is the fundamental act from which all others seem to be derived and the central point at which all my observations constantly terminated.[12]

During the past three decades the emphasis on equality has become particularly evident in what has been called "the egalitarian revolution in judicial doctrine."[13]

More than a hundred years after de Tocqueville, the Supreme Court applied the "equal protection of the laws" clause in the Fourteenth Amendment to the field of public education in the historic 1954 case, Brown v. Board of Education,[13a] and held that separate education facilities violated the constitutional guarantee of equality. Since 1954, the "egalitarian revolution in judicial doctrine" has made the equal protection clause dominant, even over the due process clause.[14] The result of the Supreme Court's egalitarianism can be found in its decisions not only on school desegregation but legislative reapportionment, desegregation of private property and school finance inter alia.

Associated with this egalitarian ethos is a greater willingness in the U.S. to challenge traditional authority, and to use litigation to achieve redress of grievance. Indeed, civil rights and liberties litigation has been a pervasive feature of the legal landscape in the U.S. for nearly half a century.[15] In contrast, the socio-legal context of Canadian life has traditionally been relatively quiescent. The greater respect for authority, which may be due to the historical experience of living under monarchical authority, of accepting a hierarchical social structure and established religion, and of becoming accustomed to a lesser concern for equality, means that Canadians have not used the courts to the extent they are used in the United States. This is changing with the enactment of the Charter, the Canadian counterpart of the Bill of Rights. At this time, the volume of judicial decisions from all levels of courts applying or interpreting the Charter (i.e. reported cases) is constant at between 500-600 per year.[16] The Charter now provides a mechanism by which a person can insist on democratic rights and freedoms by virtue of his or her status qua individual; in addition, the rights and freedoms of Canadians now exist outside the boundaries of inter-jurisdictional disputes and can be enforced. All of this suggests that the propensity to litigate so typical of the U.S. may be developing in Canada.

(b) The Civil Liberties Traditions

> We have had no war of independence and consequently no Thomas Jefferson, no Declaration of Independence ... We share, it is true, world traditions of freedom and justice; but they come to us mostly on a silver platter, bequeathed by our imperial tutors.[17]

Basic civil liberties were entrenched in the U.S. constitution in 1776. "The prominence of the Constitution as a vehicle for redressing individual grievances or class action claims is reflected in the crucial role of the U.S. Supreme Court, its judicial function in interpreting the Constitution and its propensity of handing down precedent-setting decisions affecting the entire federal system."[18]

Consequently, a strong tradition of interpreting civil rights in constitutional terms has developed in the U.S.A.

In contrast, the Canadian legal tradition of civil rights is arguably much weaker than in the U.S. Canadian jurisprudence is linked to the English Common Law tradition where basic civil rights have not been entrenched in the same way as in the U.S. constitution. Until the enactment of the Charter in 1982, the protection of human rights in Canada depended to a large extent on the passage of provincial legislation, and it is only since 1962 that all 10 provinces and the two territories enacted anti-discrimination legislation. Further, the rights and freedoms of Canadians are not absolute, not only because of the limiting provisions of section 1 of the Charter which states that the fundamental rights and freedoms are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," but also because of the ability of individual provincial legislatures to opt out of the Charter through the "notwithstanding" clauses of section 33.

Many argue, of course, that lack of constitutional entrenchment has not weakened our civil liberties tradition. After all, Great Britain's experience has been that individual rights and freedoms can be protected without an entrenched Charter or Bill of Rights. Furthermore, it is claimed that Canadians fare well when directly compared with Americans in some circumstances:

> In the 1950's, when McCarthyism disfigured the political landscape in the U.S., and washed over into Canada, the Supreme Court of Canada stood firm in defence of the rights of political dissenters.[19]

With the Charter, however, Canadians will undoubtedly become even more familiar with the concept of "fundamental rights and freedoms" now embedded in our legal structure. As indicated earlier, Canadians seem to have "taken" to the Charter. Without resolving the relative merits of these competing viewpoints, it is accurate to observe that, at this juncture, case law involving civil rights claims in Canada does not yet comprise the long-established tradition found in American legal history.

If the introduction of the Charter suggests that civil liberties case law analogous to that of the United States will develop, it would be a clear mistake to assume that the Charter is a carbon copy of the Bill of Rights. According to Tom Berger:

> The U.S. Bill of Rights is a classic statement of liberal ideas of *individual* rights, of the political and legal rights that appertain to individual liberty.
>
> ...Even a cursory examination of our Constitution and Charter will show that they take us much further than the U.S. Bill of Rights.[20]

What is clearly different, however, for the purposes of the paper is the protection of collective rights outlined in the Charter:

> The rights of both of Canada's great linguistic communities are recognized in the Constitution and the Charter. The special place of the Native people — the Indians, the Inuit and the Metis — is acknowledged. We have also acknowledged the multi-cultural dimension of Canadian society, and (Section 15 guarantees) to every individual the right to equality under the law and the right to the equal protection of the law "without discrimination based on race, national or ethnic origin (or) colour".[21]

So, an explanation of the contrasting attitudes toward freedom and judicial sanction must also include the focus on both individual and collective rights in Canada.

2. APPLICATIONS TO SCHOOL LAW

It follows that a society characterized by the concept of "elite accommodation" would encourage respect for authority figures in schools and feature built-in resistance to change. Indeed, Canadian courts have granted broad powers to school authorities, both to make and enforce rules, based on an interpretation of the relevant school act and long-standing legal principles such as in loco parentis (a delegation of parental authority to teachers) and parens patriae (the obligation of the state to define a child's best interests when the parents fail to do so). As a result, the Canadian school administrator has traditionally been able to count on a predictable socio-legal environment in which "...the likelihood of legal challenge on substantive, educational grounds is remote."[22] The American egalitarian ethos, on the other hand, would be expected to encourage more student questioning of, and less deference to, traditional authority figures in schools, and more parental legal challenges to the professional judgments of educational administrators. We contend that these hypotheses do indeed reflect the case law in both countries.

The validity of the argument that contrasting value patterns translates into contrasting legal norms and traditions will be examined by reviewing judicial decisions in two specific areas of school law — due process and student discipline, and student rights, both individual and collective. These two areas of school law respectively mirror the contrasting value patterns of elitism versus egalitarianism and the divergent civil liberties traditions.

(a) Due Process and Student Discipline

Canadian case law on the authority of school boards and administrators to discipline students reflects the principles of "elite accommodation." The authority to discipline students at common law is based on a willingness to delegate considerable autonomy to educational administrators through the doctrine of in loco parentis:

> The father may also delegate part of his parental authority...to the tutor or school master of his child, who is then in loco parentis, and has such portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed.[23]

The authority to discipline students also stems from another proposition that buttresses the notion of elite accommodation — that is, that schools are not just delegates of the parents but act as state agents carrying out an important government function. "Peace, order and good government" is writ in a smaller scale in the application and interpretation of school rules as expressed in Murdock v. Richards et al.:

> It is sometimes said that the parent, by sending his child to school, has delegated his discipline to the teacher, but since many children go to schools under compulsion of law, and the child may well be punished over the objection of the parent, a sounder reason is the necessity for maintaining order in and about the school.[24]

Deference to school authorities and the need for order are typical of judicial decisions in this area, such as Ward et al. v. Board of Blaine Lake Unit No. 57[24a] in which the court upheld

the school board's decision that an eleven year old boy could be properly suspended until his hair was cut in conformity with the school rule. It was considered legally irrelevant that the mother liked her son's hair long, and that no investigation had been conducted as to whether disruption in school resulted from the student's appearance. This willingness to delegate broad-based powers to educational administrators is explicit in Tucker J.'s reference to the following precedent:

> In my opinion, the Education Acts are intended to provide for education in its truest and widest sense. Such education includes the inculcation of habits of order and obedience and courtesy: such habits are taught by giving orders, and if such orders are reasonable and proper under the circumstances of the case, they are within the scope of the teacher's authority, even although they are not confined to bidding the child to read or write, to sit down or to stand up in school, or the like.[25]

Ward v. Blaine Lake falls in with a line of Canadian authorities dating back to the mid 1800's which hold that disciplinary action is a matter of discretion for teachers and local boards, and that courts should be very reluctant to interfere with the reasonable exercise of this discretion.[26] The legal argument in these cases is that "...the Court will not intervene if satisfied that the master acted bona fide."[27] Judicial belief that educational administrators rarely behave in a capricious, arbitrary or unreasonable manner is evident in such decisions as Gloria Hawreliuk et al. v. Board of Education of Shamrock School Division No. 38[27a] in which the court supported local school board action on the grounds that provincial legislation granted broad-based powers to the board to administer and manage educational affairs. In this case, three students who were charged with sexual assault offences on fellow students were put on "short bounds" ie. restriction of their movements within the school. An application by the students to remove the restrictions was refused. The Ward line of judicial reasoning, ie. deference to the good faith behaviour of educational administrators, would appear to be as valid today as it was in 1971 since the reasoning has never been applied or considered in any other case.[28]

A corollary to the judicial attitude that bona fide administrative action will be upheld is the judicial reluctance to import principles of due process from American case law. In Mazerolle v. School Board District No. 7 et al.,[28a] a claim by a student who was expelled for smoking that the principles of natural justice were breached was dismissed. A lesser standard was said to apply when the school board action was deemed administrative. The requirements of natural justice were satisfied if the person, whose rights were affected by an administrative body such as a school board, had full knowledge of the case against him and a fair opportunity to respond.

In contrast to the Canadian judicial attitude toward due process and discipline, the U.S. Supreme Court requires school boards to afford pupils a high standard of fairness in matters concerning suspension or expulsion. In Goss v. Lopez,[28b] the Court pointed out that denial of education, even for a short period of time, was a very serious punishment and that school officials are obliged to provide careful due process protection in such cases. The case began in 1971 (ironically, the same year as the Ward decision was made),

when many students from the Columbus, Ohio schools were suspended without first receiving a hearing. Although some were punished for documented acts of violence, others were suspended despite claims of being innocent bystanders of demonstrations or disturbances, and despite the fact that no evidence was presented against them. A group of students (including Dwight Lopez) who was suspended for up to 10 days without a hearing claimed that this violated the right to due process of law. A federal court agreed and the school administrator appealed to the U.S. Supreme Court. In a 5-4 opinion, the Court held that the U.S. Constitution protects students in cases of suspension or expulsion from public schools — in other words, due process applies. Just what process is due, has been summarized as follows:

> ...(due process) is a flexible and practical concept — it does not require a rigid set of procedures to be applied in all situations. Moreover, due process requires at least that no one should be deprived of life, liberty, or property without being informed of the charges against him and given an opportunity to be heard. At the very minimum, therefore, students facing suspension...must be given some kind of notice and afforded some kind of hearing.[29]

The implication is that the more severe the suspension or expulsion, the more rigorous the set of procedures to be applied.

The Goss v. Lopez case is important not only for its decision but for the future litigation it may encourage.[29a] Administrators in U.S. schools are now alert to the risk of error in disciplinary matters which can be mitigated by unravelling disputed facts through further investigation. At the same time, the Court in Goss v. Lopez, stopped far short of construing the Due Process clause of the Bill of Rights to require full blown hearings (right to counsel, examination, and cross-examination of witness) in connection with short suspensions. The exercise of a disciplinarian's discretion should be more informed in that a basic recognition of the student's opportunity to characterize his conduct and put it in a proper context is now legally required.

The public standard for the educational "elite" in Canada, on the other hand, is determined by local school board policy, and the discretion of the disciplinarian. If a Court is satisfied that a child has been suspended for honestly held reasons, the merits of the suspension will not be addressed. The role of the Court is simply to see if the decision was made within the board's power and if rules of procedural fairness were observed. Canadian case law, which is in accord with our traditional value patterns, will only be altered by an expansive interpretation of section 7 of the Charter of Rights and Freedoms:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Although an expansive interpretation may develop in view of the Supreme Court's determination in Re B.C. Motor Vehicle Act [29b] that fundamental justice has a substantive as well as a procedural meaning, it seems likely that with respect to due process and discipline, "... the traditions of Canada — those built into the cultural fabric of the nation — will mitigate the development of a judicial revolution in educational policy of the same scope and magnitude as has developed south of the border."[30]

(b) Students' Rights

Analysis of the civil liberties traditions in the U.S. and Canada leads to the conclusion that whereas Canadian administrators can expect a large degree of deference to their authority, American administrators appreciate the likelihood of legal challenges to their policies. Until recently, Canadians have given little thought to fundamental rights and freedoms in society, let alone in the school. According to A. Wayne MacKay:

> The concept of students' rights has not been well developed in Canada. School authorities have avoided any reference to students' rights in regulations or policy manuals. If students had been mentioned at all in such policy statements, it would have been under the heading of "duties" rather than rights. There have also been few Canadian court cases dealing with student rights.[31]

It is not surprising, therefore, that in the school setting Canadian courts have placed close limits on basic freedoms, and have deferred to and reinforced traditional school authority. This tendency is exemplified in a 1981 Alberta case upholding a student suspension for breach of a school rule banning T-shirts and blue jeans. Any right to freedom of expression gave way to the perceived need to control the student populace. In this decision, Choukalos v. Board of Trustees of St. Albert Protestant Board, Mr. Justice Milvain stated:

> It would be just as senseless to create a school system without the power of disciplining the students, as it would be to build a schoolhouse without a door through which to enter it. It could be the finest structure in the world but useless if there is no means of entering it; it could be the finest school system in the world on paper, but utterly useless without the power in those that administer the school to impose discipline on the children who attend it.[32]

In stark contrast, the seminal U.S. case on freedom of expression, Tinker v. Des Moines School,[32a] refers to "schoolhouse doors" in quite different terms:

> It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[33]

In this case, a group of students were suspended when they refused to remove black armbands worn as a symbol of opposition to the nation's involvement in the Viet Nam War. In its decision to uphold the students' rights, the U.S. Supreme Court clearly demonstrated its awareness of "...the need to balance the rights of the individual student against the value of order in the schools."[34] For a prohibition such as the school authorities adopted to be constitutionally justifiable, evidence must be led to show that there was reason to anticipate that the wearing of the armbands would 'substantially interfere' with the work of the school or 'materially disrupt' the rights of other students. Although our pre-Charter comparative analysis focusses on two cases involving the primacy of the right of freedom of expression, it is fair to conclude that the civil liberties tradition in Canadian school law is not as vibrant as that in the U.S.A.

Once again, the interesting question is whether or not the Charter will have a significant impact on students' rights in Canada. Section 2 states:

> 2. Everyone has the following fundamental freedoms:
> ...

> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

The scope of s.2 is unclear and unknown as there have been few judicial decisions to date. What is far clearer in the post-Charter era is the matter of students' "collective" rights — specifically in the area of minority language rights :

> ...the Supreme Court has been both decisive and controversial in interpreting section 23 minority language education rights. As of the end of 1985, cases involving section 23 rights had the highest rate of success of all categories of Charter cases — 23 of 25 claims were successful ...
>
> ...section 23 case law exemplifies the engagement of individual Canadians in decisions of educational policy and practice. [35]

In contrast with the relatively quiescent socio-legal context within which administrators have always operated with respect to students' individual rights, the law has become the bastion of redress in the field of collective language education rights; in this arena, more than in any other area of school law, political issues overshadow pedagogical issues and, in this sense, the Canadian and U.S. legal traditions intersect. In the desire to preserve a culture through a guarantee of language rights, Canadians are emulating the disputatious character of their American neighbours.

Why is this so? First, one must recognize that the struggle between the English and French speaking Canadians on the linguistic front dates back to the pre-Confederation era. From the Durham

Report leading to the Act of Union, 1840, which declared English to be the only official language to the strong affirmation of minority language education rights found in s. 23 of the Charter, the language issue has always been a dominant and quintessentially political issue in Canadian life. A high level of "rights consciousness" exists as evidenced by the number of white papers and commission reports that have been written on bilingualism over the years.[36] The importance of the national debate can be seen in the following comment in the Report of the Royal Commission on Bilingualism and Biculturalism:

> ...the French language is at once an essential mark of the Canadian identity and the foremost point of distinction between this country and the United States. [37]

The process of recognition of language rights, however, has until recently largely taken place in the context of negotiations between governments and representatives of minority language groups.[38] Section 23 of the Charter now states in concrete terms that a province may, in principle, impose English or French as a language of instruction. This is only the beginning of the matter, however, because only Ontario of all of the provincial governments has modified its school legislation since 1982 in order to ensure compliance with s. 23.

According to Michel Bastarache:

> The present situation is largely due to the fact that provincial legislators have not taken the necessary initiatives to implement s.23 rights; six years after the coming into force of s.23, minority language parents have found that the courts offer the only possible mechanism by

> which they can force provincial and local authorities to act. Contrary to other Charter rights, which can normally be enforced through declarations of unconstitutionality under s.52 of the Constitution Act 1982, s.23 requires that provincial authorities take steps to implement s.23 rights. Those steps are legislative when the School Act is silent or in contradiction with s.23. The steps are administrative where services must be offered, schools opened or mechanisms adopted to provide for the management of minority language facilities.
>
> Recourse to the courts has become the ultimate means of implementation of s.23 rights ... .[39]

As of March 15, 1988, thirteen court cases relative to section 23 of the Charter were heard by the Supreme Court.[40] The Supreme Court will hopefully clarify the differing interpretations of section 23 offered in the lower courts when it hears the appeal of Mahe v. The Queen.[40a]

What can be stated with certainty at this stage is that educational administrators across the country will be called upon to make local decisions on what is pedagogically required for minority language instruction, the determination of numbers, and the review of what is economically feasible. For example, in Marchand v. Simcoe County Board of Education,[40b] Mr. Justice Sirois ruled that the local school board had no choice but to take steps to provide the facilities and funding necessary to achieve at le Caron, the local French language secondary school, the provision of instruction and facilities equivalent to those provided to English language secondary schools. In Saskatchewan, the Court of Queen's Bench in Commission des ecoles fransaskoises v. Saskatchewan[40c] made it equally clear that provincial legislation would be declared unconstitutional if it fails to recognize that when a facility for minority language education exists, the minority must have "the right of governance" and the means of restricting admission to s. 23 students. In this case, s. 90 of the Education Act did not meet these requirements through the provision of parents' advisory councils. In Prince Edward Island, educators and legislators have been busy bringing various provisions of the School Act in line with the Charter in view of the March 4, 1988 decision of the Prince Edward Island Court of Appeal which made several rulings on the constitutional validity of the provincial legislation.[41]

Finally, it is worth noting that when we speak of collective rights, we are technically referring to the collective rights of the parents, not of the students. The court in Reference re Education Act of Ontario and Minority Language Education Rights[41a] established that Section 23 confers rights on parents and not their children. In fact, a student need not even speak the minority language in order to exercise his right to education. The short shrift given to children's legal rights in Section 23 is very much in keeping with the Canadian school law tradition in contrast to that in the U.S.A..

3. IMPLICATIONS FOR ADMINISTRATIVE PRACTICE: TRADITION AND CHANGE

> If one were asked to describe a Canadian in the simplest and most succinct language, it would not be surprising to hear Americans characterize a Canadian as a "slow American."[41b]

The respect for traditional authority and the status given to individual student rights have placed the Canadian educational administrator in quite a different position to that of his American counterpart. If the analysis is correct, "...then the Canadian school executive finds educational change to be ordered and gradual, usually achieved through legislation and policy rather than judicial decision, and finds the actual governance of schools to be more predictable...".[42] In this sense, perhaps, we are "slow Americans" because Americans have traditionally demonstrated a greater willingness to initiate litigation in order to ensure that educational policies and practices satisfy the requirements of the Constitution. Canadians, on the other hand, have sought redress through the political process rather than through the courts.[43] It is in the actions of school boards, ministry officials, and teacher professional organizations that one finds a substantive body of Canadian "school law" rather than in the written decisions of judges.

Further, since decisions made in a school context are classified as being administrative — as opposed to judicial or quasi-judicial — the Canadian educator has not needed to be overly concerned with a court substituting its own opinion on the merits of a decision. The role of the court is simply to see if the decision was made within the authority's powers, ie. to focus on the procedures followed rather than the substance of the matter. Given this legal tradition, and judicial deference to the established social order, it is our view that in matters of school discipline the Canadian school administrator "...will not experience the massive incursion into educational policy-making that has occurred in the United States" [44].

Will the social contract be re-negotiated under the Charter or will we succumb to our nation's entrenched values of elite accommodation? A. Wayne MacKay has issued the following cautionary note:

> It is easy to overstate the likely impact of the Charter of Rights in the school context. All rights guaranteed by the Charter are subject to the "reasonable limits" clause, which is likely to be writ large in the school setting... .[45]

It seems likely that such factors as the traditional deference to authority and the reluctance to litigate will "...mediate the extent to which the Charter of Rights and Freedoms will serve as a mechanism for legal challenge in general, and for legal challenge to educational practice in particular."[46]

Another significant outcome may be that we may gain a sense of nation-wide priorities in education such as those generated in the United States. by various federal initiatives. The Ontario Minority Language Education Reference made it clear that section 23, for example, imposed "... a national code in the area of educational policy-making that previously reflected regional differences."[47] The coming years will, therefore, see the impact of the nationalizing influence of the Charter on educational policy across the country

With respect to individual student rights, it is reasonable to predict that social and political change will continue to be characterized by incrementalism and traditionalism in Canada. The Charter was the product of numerous federal-provincial meetings of duly constituted governments. On the other hand, the American Revolution created both the need for and the opportunity to write the

Bill of Rights — law that would reflect the aspirations and ideology of a new nation. This willingness to experiment carried through the frontier experience with settlement occurring ahead of institutionalized law enforcement procedures, thus creating spontaneous "rule of thumb" law. The American judicial tradition is thus characterized by spontaneous and situationally specific law being created through an interpretation of the Bill of Rights. Contrast this tradition with Canada's frontier experience which was sanctioned and supported by the national government and where claims were staked by the CPR and the Northwest Mounted Police, as the agents of government.[48] Canadian value patterns with respect to authority lead us to concur with A. Wayne MacKay that "Although the potential impact (of the Charter) is great, it would be hasty to assume that students' rights will mushroom or that the recent U.S. precedents will be followed in Canada" [49] Evolution, not revolution, will be the mode of socio/legal change in our schools.

The integrity of this analysis is not undermined by the fact that educational policy and practice are and will continue to be changed by litigation. On September 23, 1988, for example, the Ontario Court of Appeal, in Zylberberg et al. v. The Director of Education of the Sudbury Board of Education,[50] declared that s.28(1) of Ontario's Regulation262 made under the Education Act[50a] was of no force and effect because it infringed the Charter freedom of conscience and religion. The effect of s.28(1) was to impose Christian observances — recitation of the Lord's Prayer and the scriptures — upon non-Christian pupils, and this imposition was said to exist despite the provision for exemptions. The court held that the "peer pressure and the classroom norms to which children are 'acutely sensitive', are real and pervasive and operate to compel members of religious minorities to conform with majority religious practices."[51] This is, without question, a significant decision for educational administrators — and the only two provinces (B.C. and Manitoba) which still enforce mandatory religious exercises in the classroom will be challenged in the courts. We acknowledge that significant change will be initiated by litigation in some circumstances but believe that the broad sweep of change will continue to be ordered and measured.

What unequivocally does make educational administration in Canada unique is the issue of collective rights — or quite simply, the "French" question. According to Claudette Tardif, of the Faculté Saint Jean, University of Alberta:

> ...school boards and administrators need to begin informing themselves on the issues that relate to minority language education so as to begin planning innovative administrative structures for language policy and language planning... [52]

Judicial analysis of education and minority language issues has traditionally focussed on the division of legislative powers in this area. With the Charter, courts are now examining not only the extent to which constitutional guarantees limit the powers to legislate, but also the affirmative action plan built into section 23 with the intent of reducing the problem of linguistic assimilation.[53]

More specifically, educational administrators need to be cognizant of the fact that section 23 allows for educational facilities that provide for homogeneous minority language schooling.

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including a measure of governance by and for the particular minority. Unfortunately, administrators who are not reacting to the clear legal message will likely find themselves in lawsuits. Tardif describes the situation in Alberta:

> ...the overwhelming majority of the schools that offer French language instruction continue to be French immersion schools. There are only two French minority schools in the province: the Ecole Sainte-Anne, in Calgary, and the Ecole Lavallé, in Edmonton. A French minority K-9 school is planned to open in St. Osidore, a small community in Northern Alberta, in September 1988. As well, there are presently three other requests for French minority schools before local school boards in different areas of the province (Fort McMurray, Morinville-Legal, St. Paul). In the St. Paul area, a group of Francophone parents have brought suit against the school board and the provincial government on matters relating to the application of Section 23: transportation costs and lack of homogeneous French language schools.[54]

Tardif insists that "litigation in the education sector is inescapable for the Francophone minorities in the near future."[55] The avoidance pattern on the part of politicians filters down to local school boards who provide little or no educational services to the French linguistic minority group in their region.[56] If the local school boards do not use their discretionary powers to provide leadership in this area, the courts will, after considerable expense to the taxpayers, be compelled to provide direction. Given the divergence between legal rights and political attitudes, one can only send a clarion call to those educational administrators not yet mired in a lawsuit to alter current practice in accord with a liberal interpretation of Section 23. Too great an intrusion of the legal system can be avoided if educators try to understand the implications of the Charter and make an honest, informed effort to put their "schoolhouses" in order.[57]

4. CONCLUSION

We have argued in this paper that the historical, political and legal evolution of Canada and its traditions has distinctively differed from that of the United States. It has differed sufficiently, in fact, to render uncritical adoption of U.S. case law as a guide to interpreting and applying the Charter at best a hazardous undertaking, and, at worst, a thoroughly mistaken practice. Law is expressly a cultural institution[58]; as such, the development of U.S. case law has reflected and continues to reflect the distinctiveness of the American cultural, social and historical experience. In the same way, Canadian law reflects the distinctiveness of the Canadian experience. U.S. case law is not now nor can it ever (under existing political arrangements) serve as "precedent" for the Charter of Rights and Freedoms. The situation, in fact, is quite the reverse, as Canadian courts are forging a distinctive Canadian jurisprudence, grounded in the Canadian historical, social and legal tradition. Canadian courts do refer to the U.S. experience — as illustrative, informative, in some cases as persuasive, but not as precedent. Legal tradition and norms in Canada are distinctively different and this difference needs to be fully acknowledged in any analysis of law affecting Canadian social institutions, including schools.

Footnotes

[1] P.F. Bargen, The Legal Status of the Canadian Public School Pupil. (Toronto: The Macmillan Company of Canada Limited, 1961), p. 1.

[2] Michael Manley-Casimir, "Canadian and U.S. Legal Traditions: Implications for Administrative Practice" (November 1982), 2 Canadian School Executive, 18. The present paper is an expansion and development of the argument first developed in this article.

[3] J.H. Lyon & J.E. Claydon, "Comparative and International Sources for Interpreting the Charter: A Selective Annotated Bibliographic Guide." A Practical View of the Charter for Solicitors and Barristers (Toronto: Continuing Legal Education, 1986), pp. 1-39 at p. 24.

[4] T.R. Berger, "Towards the Regime of Tolerance" in Courts in the Classroom ed. M.E. Manley-Casimir and T. Sussel (Calgary: Detselig Enterprises Limited, 1986), pp. 95-105 at p. 98.

[5] S.M. Lipset, Revolution and Counterrevolution: Change and Persistence in Social Structures (New York: Basic Books, 1968), p. 51.

[6] Note 2 above, at p. 18.

[7] R. Presthus, "Evolution and Canadian Political Culture: The Politics of Accommodation" in Perspectives on Revolution and Evolution ed. Richard Preston (Durham, NC: Duke University Press, 1979), p.126.

[8] Note 2, above, at p. 18.

[9] T.R. Berger, Fragile Freedoms (Toronto: Irwin Publishing, 1982), p. 200.

[10] Ibid., p. 197

[11] Hon. Mark R. MacGuigan, "The Protection of Freedom and the Achievement of Equality in Canada" in Civil Liberties in Canada ed. G. Gall (Toronto: Butterworths, 1982) pp. 225-249 at p. 225.

[12] Ibid., p. 234.

[13] P.B. Kurland, "The Supreme Court, 1963 Term - Forward: 'Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government' " (1964), 78 Harvard Law Review 143.

[13a] 347 U.S. 483.

[14] Ibid., p. 144.

[15] David Rosenberg "Litigating Civil Rights and Liberties in the U.S.: A Vital but Flawed Enterprise" in Litigating the Values of a Nation: The Charter of Rights and Freedoms eds. Joseph M. Weiler and Robin M. Elliot (Toronto: Carswell, 1986), pp. 357-377 at 357.

[16] F.L. Morton & M.J. Withey, Charting the Charter, 1982-85: A Statistical Analysis. Occasional papers series, Research study 2.1. Research Unit for Socio-Legal Studies, Faculty of Social Sciences, University of Calgary, September 1986, p. 2.

[17] J.P. Humphrey & R. St. J. Macdonald, The Practice of Freedom (Toronto: Butterworths, 1979), p. xv.

[18] Note 2, above, at p. 19.

[19] Berger, note 4, above, at p. 96.

[20] Ibid., pp. 96-97.

[21] Ibid., p. 97.

[22] Note 4, above, at p. 21.

[23] Blackstone Commentaries, Vol. 1 (Oxford: Clarendon Press, 1770) p. 713.

[24] Murdock v. Richards et al., [1954] 1 DLR 766 at 769.

[24a] [1971] 4 W.W.R. 161.

[25] Smith v. Martin et al., [1911] 2 K.B. 975 at 784 per Farwell, L.J.

[26] Murdock v. Richards et al., note 24, above, at pp. 179-185.

[27] Ibid., p. 187.

[27a] (1987), 57 S.R. 188.

[28] Ward was discussed once, and only in reference to the powers of a school board. See Prefontaine v. Board of Regina (East) School Unit No. 20 (1979) 99 DLR (3d) 223 (Sask QB).

[28a] (1987), 74 N.B.R. (2d) 377.

[28b] 419 U.S. 565

[29] David Schimmel & Louis Fischer, "Discipline and Due Process in Schools." School Law, Cases and Dalhousie Law School materials, pp. 367-372.

[29a] For example, see P. Zirkel, "The Pendulum Swings on Expulsion Hearings" (1988), 70 Kappan 334.

[29b] Reference re Section 94(2) of The Motor Vehicle Act [1985] 2 SCR 486.

[30] Note 2, above, at p. 21.

[31] A. Wayne MacKay, Education Law in Canada (Toronto: Emond-Montgomery Publications Limited, 1984), p. 293.

[32] Choukalos v. Board of Trustees of St. Albert Protestant Board, unreported decision cited in (1981) Canadian School Executive 10.

[32a] 393 U.S. 503 (1969)

[33] Ibid., p. 503 per Mr. Justice Fortas.

[34] A. Wayne MacKay, "The Charter and Individual Rights: Implications for Schooling," in Courts in the Classroom note 4, above, at p. 32.

[35] M.E. Manley-Casimir and P. Pitsula, "The Charter, Culture and the Public School Curriculum: Emerging Perspectives and Guidelines" (1988), 1 Education Law Journal, at 65 and 68.

[36] Harold E. Jakes provides an historical overview of French language governance through numerous legal decisions, political lobbies and debates in "The Governance of Minority Language Education Councils in Ottawa-Carleton School Boards." A paper presented at a meeting of the Canadian Association for the Study of Educational Administration, University of Windsor, June 1988.

[37] Royal Commission on Bilingualism and Biculturalism, Vol. I. The Official Languages, 1967, Ottawa: Queen's Printer, p. xxi.

[38] Michel Bastarache, Language Rights in Canada (Montreal: Les Editions Yvon Blais Inc., 1987), p. 42.

39 Michel Bastarache, "Comment" (May 1988), 2 School Law Commentary 3.

40 Claudet Tardif, "Issues in French Language Minority Education." Faculté Saint-Jean, University of Alberta, p. 23.

40a [1987] 6 W.W.R. 331 (Alta. C.A.).

40b (1986), 29 D.L.R. (4th) 596.

40c

41 "Prince Edward Language Rights," (October 1988), 3 School Law Commentary 1-2.

41a (1984), 10 D.L.R. (4th) 491 (Ont. C.A.).

41b Results of a study of U.S. attitudes towards Canada conducted by the Institute for Analytical Research, Peekskill, N.Y. reported in W. Stewart, As They See Us (Toronto: McClelland and Stuart, 1977), p. 120.

42 Note 2, above, at p. 21.

43 Note 31, above, at p. 294.

44 Note 2, above, at p. 21.

45 Note 31, above, at p. 194

46 Note 2, above, at p. 21.

47 Note 35, above, at p. 64.

48 Note 2, above, at pp. 18-19.

49 Note 31, above, at p. 294.

50 Ont. C.A., Doc. No. 567/86, September 23, 1988.

50a R.S.O. 1980, c.129.

51 "Religious Exercises Unconstitutional" (November 1988), 3 School Law Commentary 1.

52 Note 40, above, at p. 25.

53 Ibid., p. 15.

54 Ibid., p. 17. As noted earlier, a decision offering some clarity on section 23 implementation is expected when the Supreme Court hears the appeal of Mahe v. The Queen [1987] 6 WWR 331 (Alta. CA). It is interesting to note that the Attorney General of Canada filed a Notice of Intervention in Fall 1988. Clearly, the issues to be decided will have national significance for educational administration.

55 Note 40, above, at p. 32.

56 Signs of a changed attitude are emerging. On August 26, 1988, the governments of Canada and Nova Scotia signed a memorandum of understanding to establish a Francophone community college in Nova Scotia, The College de l'Acadie, which will serve the entire Acadian population in Nova Scotia. This memorandum represents the government's commitment to enhancing the vitality of the official language minority communities and supporting and assisting their development.

57 Don Hartwig, "Special Needs Students." School Law, Continuing Legal Education of B.C., December 1987, 3.1.09.

58 Note 35, above, at pp. 39-43.